DATE: JULY 3, 1996

CASE NO: 94-INA-499

IN THE MATTER OF BONNIE DEWITT
Employer

on behalf of

VICTORIA RIOS
Alien

BEFORE: Huddleston, Jarvis and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

ORDER OF REMAND

This case arises from Bonnie Dewitt's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On November 2, 1992, Employer filed a Form ETA 750 Application for Alien Labor Employment Certification with the Pennsylvania Employment and Training Administration on behalf of the alien, Victoria Rios. The job opportunity was listed as Cook and the job duties were described as follows:

> Plan, prepare, cook and serve meals in a private home according to recipes of employer. Prepare fancy dishes and desserts for parties. Purchase groceries. Clean kitchen and cooking utensils.

AF 34.

Employer listed the following requirements: two years experience in the job offered, literacy, verifiable employment references, no smoking or drinking on the job, and flexible hours. Employer indicated that the employee would be employed 30 hours per week. Three individuals applied for the position. AF 31.

On October 4, 1993, the CO issued a Notice of Findings ("NOF") proposing to deny Employer's application. The CO stated that although Employer indicated that the alien would be employed 30 hours a week cooking for the household and carrying out related food preparation duties, it did not appear feasible that the duties described could constitute full-time employment. The CO stated that the occupation of full-time Cook consists of approximately 35 to 40 hours per week.

The CO required Employer to submit evidence establishing that the job offer meets the definition of full-time employment, including answers to the following questions: (1) the number of meals prepared daily and weekly, the length of time required to prepare the meals and the number of people for whom the meals are prepared; (2) the frequency of household entertaining in the twelve month period preceding the filing of the application; (3) whether the alien would be required to perform duties other than cooking; (4) schedules of the parents and any children in the household, as well as information regarding the care of any children when the alien is engaged in preparing meals and during the alien's time off; and (5) if the alien is currently employed, who has performed child care and general household maintenance work since the alien was hired in June of 1991.

On January 25, 1994, Employer submitted a rebuttal to the NOF in the form of an affidavit. AF 11-15. Employer informed the CO that the employee would be required to prepare three meals daily for four household members, as well as meals for visiting family members two to three days per week. Employer stated that the employee would purchase ingredients, prepare and freeze meals for consumption on the employee's days off, and prepare food for entertaining large and small groups. Employer submitted the family entertainment calendar for the twelve month period preceding filing of the application, and offered to provide guest lists and affidavits from guests.

Employer stated that she and her husband work full-time and that the family includes a two year-old child. Employer indicated that the child attends school twice a week and has a full-time caretaker, who also performs all household cleaning duties. Employer stated that the alien is not currently employed and that the alien would not be involved in child care or housecleaning. However, Employer did not indicate who had performed these duties since the alien was hired in 1991. Finally, Employer discussed her reasons for rejecting the three applicants for the position.

The CO's Final Determination denying certification was issued on March 29, 1994. The CO stated that Employer had satisfactorily established that the three applicants were rejected for lawful, job-related reasons. However, the CO found that the position did not meet the requirement of full-time employment. The CO noted that Employer had made changes on the Form ETA 750 application in an apparent attempt to "tailor the application," and that "[i]t appears that the information provided has been exaggerated."

The CO determined that the rebuttal evidence did not establish that the position should be considered a bona fide job opportunity and not created solely for the purpose of qualifying the alien as a skilled worker, thereby avoiding a long wait for an immigrant visa in the unskilled category. The CO stated that Employer had not identified the fourth member of the household, and found that the fact that the family's entertainment schedule included a significant number of dinner parties for four suggested that these events were routine family dinners recharacterized as entertainment. The CO further noted that the rebuttal was silent on whether the alien had performed child care or housecleaning duties since being employed in 1991, and that Employer had not provided information regarding who had performed those duties since that time.

On May 3, 1994, Employer filed a Request for Review and for additional Notice of Findings. Employer argues that the CO improperly raised the issue of the changes on the ETA 750 application for the first time in the Final Determination. In addition, Employer contends that all of the CO's questions were fully addressed in the rebuttal. Employer asserts that since the CO "never simply asked" . . . "who has performed child care duties since 6/91," Employer could not be accused of having evaded the question. In addition, Employer points out that the CO did not ask when the child's full-time caretaker had been hired.

Discussion

Employer argues that common sense and fundamental fairness prohibit the denial of certification for a reason that was raised for the first time in the CO's Final Determination. Accordingly, Employer contends that the denial should be reversed since the CO did not note his impression that the application was "tailored" to meet the requirement of full-time employment until the Final Determination. We agree.

The NOF did not raise the question of whether the application was tailored to meet the requirement of a full-time job. The CO's questions regarding who had been responsible for child care and housekeeping duties since the alien as hired in 1991 were not precise nor was the request for details of the current caretaker/housekeeper's employment. In these circumstances the case should be remanded to the CO to issue a supplemental NOF and afford the Employer the opportunity to file rebuttal to the matters first raised in the Final Determination. *Downey Orthopedic Medical Group,* 87-INA-674 (March 16, 1988)(*en banc); Santa Barbara Immigration Center,* 90-INA-307 (Oct. 31, 1991); *Marathon Hosiery Co., Inc.,* 88-INA-420 (May 4, 1989)(*en banc).*

ORDER

The Final Determination of the Certifying Officer is vacated and the case is remanded to him for the issuance of a supplemental Notice of Findings.

For the Panel

DONALD B. JARVIS
Administrative Law Judge